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No. 85-1715

In the Supreme Court of the United States

October Term, 1985

THE CITY HOSPITAL OF BELLAIRE,
Petitioner,

vs.

NANCY DELGUZZO, EXECUTRIX, etc.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF FACTS

Petitioner contends that it lost its right to jury trial by reason of a few days excusable delay in filing a notice of appeal. In fact, there was a five month inexcusable delay in attempting to appeal the critical and controlling judgment which originally imposed liability on the Petitioner. The record in this case discloses two separate

final judgments. The first, the only liability judgment was never appealed.

Ohio has a special procedure for medical malpractice cases whereby, after suit is filed, the case must be submitted to a court-appointed arbitration panel. After the award is filed, each party has an absolute right to reject the award and demand a regular jury trial. In the absence of proper rejection any party can move the court to convert the award into an enforceable trial court judgment. That judgment can be appealed in the usual way if error has occurred in the procedures for reducing the award to judgment. O.R.C. 2711.21 (App. 78a).

In the instant case an arbitration award was made in Respondent's favor on August 3, 1984. Petitioner then moved the trial court simply to modify the award by deducting an offset. Respondent moved to confirm the entire award. The trial court heard both motions on February 5, 1985, studied the briefs and rendered a decision in March. The judge filed his Judgment Journal Entry, which confirmed the award and rendered judgment against Petitioner, on March 22, 1985.

The Petitioner then had 30 days in which to file an appeal under Ohio's Appellate Procedure Rule 4(A) (App. 72). Within that 30 day period Petitioner made no attempt to appeal, but instead elected on April 18, 1985 to file a Motion to Vacate the judgment under the court's "inherent common law power" or, alternatively, under Ohio's Civil Procedure Rule 60(B). This rule (not printed in the Appendix but appended to this Respondent's Answer brief) explicitly states that a Rule 60(B) motion "does not affect the finality of a judgment or suspend its operation." The rule is in full accord with Appellate Rule 4(A) (App. 72a) which specifies the few types of motions

which will suspend the running of the time limit for appeals. A motion under Rule 60(B) R.C.P. is not included in the list of procedures which will stay the time limit.

Petitioner also filed on April 1, 1985 a motion to amend pleadings and to fix a trial date, and included a notice that Petitioner then rejected "the arbitrators' award" (App. 55a). At that time the arbitration award had already been merged into the final judgment. The notice of rejection of award has no resemblance to a notice of appeal, and Petitioner makes no such claim. The motion to amend pleadings and fix a trial date is not one of the specified types of motion which will stay the running of the time limit for appeal.

No further action occurred until August 12, 1985, when the trial court, after due consideration of both parties' briefs, overruled the Motion to Vacate and the Motion to Amend Pleadings and set a Trial Date (App. 7a).

This journal entry in August is the only final judgment which Petitioner has attempted to appeal, and is the only judgment entry involved in the pending Petition for Writ of Certiorari. This second judgment imposed no liability upon Petitioner. It merely let stand the original liability judgment of March 22, 1985 which had long since became final and appeal-proof. Petitioner has never stated any excuse for its election to move to vacate the original judgment instead of appealing it in the usual manner.

Contrary to Petitioner's statement on page 2 of his brief that the Trial Court's Judgment of April 12, 1985, denied him his right to a trial by jury, he had failed to demand his trial by jury after the arbitration but before final judgment of March 22, 1985.

REASONS FOR DENYING THE WRIT

I. A PARTY IS NOT DEPRIVED RECOURSE TO THE COURTS IN VIOLATION OF CONSTITUTIONAL RIGHTS OF DUE PROCESS AND EQUAL PROTECTION WHERE HE VOLUNTARILY ELECTS NOT TO APPEAL A STATE TRIAL COURT FINAL JUDGMENT AWARDING DAMAGES BASED UPON A MEDICAL MALPRACTICE ARBITRATION AWARD.

The Ohio Supreme Court did not decide any federal question. It simply declined to review an Ohio Court of Appeals decision that restated the Ohio rule that timely filing of a notice of appeal is jurisdictional. The filing requirement is not satisfied by the mere act of mailing without actual delivery. The burden is cast upon the appellant to follow up after mailing to verify that the Clerk received the mail. When Petitioner mailed the notice 12 days before the time limit but failed to make any effort to verify delivery, even after he did not receive his requested time-stamped copy, he assumed the risk of nonfiling.

Petitioner claims a denial of a constitutional right to jury trial. The fact is that Petitioner had an absolute right to trial by jury by rejecting the arbitration award before it was reduced to judgment. Petitioner failed to reject the award and failed to appeal the original final judgment based on the award. The appeal involved in the instant case is based upon rulings on post-judgment motions. Those motions were not a substitute for appeal, did not enlarge the time for appeal, and left intact the original liability judgment. The pending petition for writ of certiorari will not reach back to review the original

liability judgment, with the result that the jury trial issue has long since become moot.

The record is clear that Petitioner failed to appeal the original liability judgment of March 22, 1985. Petitioner elected to pursue instead post-judgment motions under Civil Rule 60(B) which did not affect the finality of the judgment or extend the time for appeal. When the trial court overruled those motions, Petitioner pursued a frail hope that an Appellate Court might find an abuse of discretion in the Trial Court's rulings on those motions.

Petitioner's counsel at that time had offices in Steubenville, 35 miles from the Belmont County Courthouse in St. Clairsville. He mailed a letter to the Clerk of Courts containing a proper notice of appeal with extra copies, and requested the Clerk to time-stamp a copy and mail it back in an enclosed return envelope to verify filing. Counsel posted the letter on August 30, which was twelve days before the time limit for appeal expired on September 11, 1985. During that critical twelve days, counsel did not receive the mail return of the requested time-stamped copy. The day of August 30 fell on a Friday in 1985. In normal course, the mail should have reached the Clerk on Monday, September 2. Counsel should have received the returned stamped copy in normal course no later than Monday, September 9. A simple telephone call to the Clerk on that day, or the next, or the final day would have disclosed the miscarriage of the mail attempt in time for counsel to make the essential actual filing. A short 35 mile automobile trip is not much of a burden to preserve the right of appeal in a state which has always held that jurisdiction of the Appellate Court does not attach until actual filing of the mandatory notice.

Ohio's practice in this respect differs from the federal practice. Ohio's Appellate Rule 4 contains no section comparable to F.R. App. P. 4 (5), which provides that the District Court may extend the time limit upon motion filed within 30 days after the expiration of the original time limit. Even so, federal practice requires a showing of "excusable neglect or good cause." It is doubtful that even under federal practice an unexplained neglect for 12 days to monitor the requested return mail would be deemed "excusable." The fact that Ohio has not embraced the doctrine of excusable neglect or the concept of mailbox filing may make Ohio's practice old-fashioned, but hardly unconstitutional.

Petitioner makes a second point, contending that counsel mailed within the 30 day rule a Request for Transcript, which was received by the Clerk's office and filed on September 6, within the time limit of September 11, 1985. Petitioner argues that "the request for transcript put both the Court and the opposing party on notice." (Brief at 19). The Request itself (App. 45a) is directed to "Court Reporter Alice Reilly" and asks her to transcribe the proceedings before Judge Knapp "on February 5, 1985." This is certainly not in the form required by Ohio App. R. 3(C) (App. 73a), which requires designation of the judgment or order appealed from. The proceedings before Judge Knapp on February 5, 1985 were the oral arguments and testimony which produced the original judgment of March 22, 1985. (See Opinion of Judge Knapp dated March 20 at App. 13a.) If this Request to the Court Reporter should be deemed a notice that an appeal was pending or intended, it necessarily implied an appeal from the judgment of March 22, 1985, which had resulted from the February 5th hearing.

Ohio law has long held that:

> "Compliance with the requirements as to the filing of the notice of appeal—the time filing, the place of filing, and the content of the notice as specified in the statute—are all conditions precedent to jurisdiction." *Zier v. Board of Unemployment Compensation* (1949), 151 Ohio St. 123, 127 (cited by Petitioner, Brief 18 n.2).

In *Zier,* the appeal was dismissed because the notice did not specify the final judgment or order appealed from.

Ohio practice is liberal in allowing amendment, when the content of the notice is technically inadequate. Where a notice specifies that the order appealed from is the overruling of a motion for new trial or motion for judgment n.o.v., the Courts will allow amendment to appeal the final judgment underlying the motions. If Petitioner's counsel really believed that the Request for Transcript was an adequate substitute notice of appeal, petitioner had an available remedy to amend under Ohio App. R. 3(E). That rule provides that "The Court of Appeals within its discretion and upon such terms as are just may allow the amendment of a timely filed notice of appeal." Petitioner ignored this procedure, and instead simply filed a new notice of appeal, mailed again on September 26 and this time received and filed on September 30, 1985, nineteen days past rule. The appeal then reposed in the Court of Appeals until October 23, 1985 with no effort by Petitioner to convert the Request for Transcript into a Notice of Appeal by amendment. The obvious reason for the failure to amend is that the amendment would convert the Request for Transcript into an appeal from the judgment of March 22, 1985, which resulted from the hearing on Feb uary 5, 1985. The appeal time limit on that judg-

ment had long since passed. An amendment of the Request for Transcript, to make it an appeal from that judgment, would have been futile.

There is no constitutional due process question in the fact that the Appellate Court did not, on its own motion, interpret the Request for Transcript as an adequate notice of appeal from second judgment entry of August 12, 1985, which overruled the motions attacking the first judgment.

II. THE DECISION BELOW IS NOT A DEPARTURE FROM STANDARDS USUALLY FOLLOWED BY OHIO IN THE INTERPRETATION OF ITS APPELLATE RULES; AND IT DOES NOT EFFECTIVELY DENY THE RIGHTS OF PETITIONER TO HAVE HIS CASE HEARD ON THE MERITS NOR DEPRIVE HIM OF HIS RIGHTS TO TRIAL BY JURY.

A. Where The Appellant Timely Mails A Notice Of Appeal To The Clerk Of Courts By Ordinary Mail And Requests A Filed Stamped Copy To Be Returned, And The Clerk Does Not Receive The Notice And Does Not Return A Filed Stamped Copy, There Cannot Be A Presumption That The Clerk Received The Notice Of Appeal Within The 30 Day Time Period.

It is without question that Appellate Rule 4(A) requires actual delivery of the notice of appeal to the Clerk of Courts and the timely filing of such notice in order to effectively pursue an appeal. *Fulton v. State, ex rel. G.M. Corp.* (1936), 130 Ohio St. 494. Timely filing of a notice of appeal is the only jurisdictional requirement,

Loos v. W. & L. E. Ry. Co. (1938), 134 Ohio St. 321; *Ross v. Harden* (1982), 8 Ohio App. 3d 34.

In *Bosco v. City of Euclid* (1974), 38 Ohio App. 2d 40, the Court held that the timely filing of a notice of appeal is jurisdictional and without it the Court cannot act. In *Bosco* the Court refused to permit the appellant to file an appeal of an order denying a motion to vacate a judgment when he had failed to appeal the judgment within 30 days. The court concluded at p. 44:

> "The appellants' objective is obvious. The only pertinent factual basis set out in the affidavit to support the motion to vacate is a claimed failure of notice of the date of judgment until after the thirty day appeal period had expired. A determination of that justification was foreclosed when the first appeal was dismissed for untimely filing of the notice of appeal. Given these facts it would violate the purpose of Civ. R. 60(B)(1) and (5) to allow it to substitute for appeal or be used to circumvent the policy of App. R. 4(A) establishing an appeal period of thirty days. There was no factual issue requiring a hearing. The denial of the motion to vacate was not contrary to law. 'There must be an end to litigation some day,. . . .' *Ackermann v. United States* (1950), 340 U.S. 193, 198, 95 L. Ed. 207, 211."

See also, In Re: Estate of Whitman (1983), 13 Ohio App. 3d 170 and *Price v. Jones* (1983), 9 Ohio App. 3d 64.

This is exactly what we have here where the defendant missed the 30 day statutory requirement for filing his appeal and now seeks to extend that period. There is no basis for that procedure to be followed. There is no evidence that the notice of appeal was received by

the clerk or that the clerk failed to journalize it upon the docket.

In *Young v. Bd. of Review* (1967), 9 Ohio App. 2d 25, the evidence indicated that the clerk had received the notice of appeal and had misplaced it; thus, the notice had been received by him within 30 days but not acted upon. There is no evidence here that the clerk received the notice within 30 days of the order, only that it was placed in the mail within 30 days. There is no provision for filing a notice of appeal by mail. Here, there is no returned receipt by the clerk and no stamped copy by the clerk. In fact, the defendant was on notice that the appeal had not been filed because they requested a stamped copy be returned to them and it never was. They should have at least called the clerk's office and asked why they had not received the stamped copy of the notice of appeal before the 30 days expired.

In *King v. Paylor* (1942), 69 Ohio App. 193, the Court stated at p. 194 in a headnote:

> "2. Leaving a notice of appeal in the office of the clerk of courts without his knowledge is not a filing as of that time within the meaning of Section 12223-4, General Code, governing the time in which a notice of appeal may be filed and does not become a filing until it is brought to the attention of the clerk and he takes custody of it as clerk."

Here the clerk cannot be charged with the receipt and filing of a document of which he had no knowledge.

The Appellate Court was without jurisdiction to hear an appeal as set forth in this case.

The Appellant relies on the case of *Dudukovich v. Housing Authority* (1979), 58 Ohio St. 202 in support of his position. That case is easily distinguishable from this, in that the notice of appeal was required to be filed within 10 days with the Clerk of the Common Pleas Court and with the Housing authority. The notice of appeal was filed in time and a certified mail copy was sent to the Housing Authority within 5 days; and there was evidence in the record that the notice was actually received. Here, of course, there was no certified mail and no evidence of receipt by the Clerk.

B. Where A Notice Of Appeal Is Not Timely Filed Within The 30 Day Period Prescribed By App. R. 4(A), A "Request For Transcript" Of Proceedings Of A Hearing On A Motion, Resulting In A Judgment That Is Not The Subject Of The Appeal, Cannot Be Treated As A Notice Of Appeal.

Appellant argues that his filing of a request for a transcript within the 30 day appeal time should constitute a properly and timely filed notice of appeal.

It should be noted that the instant appeal deals with a ruling by the Trial Court on a Motion to Vacate and a Motion to Amend Pleadings of August 12, 1985; the request for a transcript refers only to proceedings before Judge Knapp on February 5, 1985. There is no way that the request for a transcript can be said to contain information that is reasonably calculated to advise anyone of the ruling that is sought to be appealed, especially since the rulings made on March 20 and 22, 1985 were the ones that were based on the February 5, 1985 hearing.

Appellant suggests that the *Dudukovich* case, *supra*, supports his position that his request for transcript satisfies the requirements for a notice of appeal. The case stands for no such thing, since it deals with the mailing of a copy of notice to a housing authority where the evidence shows that the notice to the court was in fact received. In *Roseman v. Reminderville* (1984), 14 Ohio App. 3d 124, the appellant provided a signed certified mail return receipt showing service of the notice of appeal on the village clerk.

Likewise in *Richards v. Industrial Commission* (1955), 163 Ohio St. 439 and *Capital Loan & Savings Co. v. Biery* (1938), 134 Ohio St. 333, the Supreme Court dealt with cases where *timely* notice of appeal was accomplished and either an amendment was allowed or notice of appeal was incorporated into a journal entry.

In *Commonwealth Oil Co. v. Turk* (1928), 118 Ohio St. 273 at 275, the Court stated that the sole issue to be determined was whether an appeal may be perfected from the Municipal Court to the Court of Appeals. Once again, in *Castleberry v. Evatt* (1946), 147 Ohio St. 30, the Supreme Court dealt with a case where there had been a *timely* notice of appeal filed. The same was true in *In Re: Guardianship of Wisner* (1947), 148 Ohio St. 31; and in *McDowell v. Hannefeld* (1950), 87 Ohio App. 407; and *Moore v. Foreacher* (1951), 91 Ohio App. 28. Likewise in *Maritime v. Marina* (1982), 70 Ohio St. 2d 257, the Court dealt not with a case like we have here but solely with the issue of the interpretation of App. Rule 3(C) which requires the notice of appeal to designate the order appealed from. The appellant stretches much further to his conclusion because here there was *never* a *timely* notice of appeal filed.

The appellant thus has not only failed to have filed a timely notice of appeal of the judgment of March 22, 1985, which has never been denied, but failed to file a timely notice of appeal of the judgment of August 12, 1985. The mere filing of a request for a transcript of proceedings of February 5, 1985, which was not the proceedings on the judgment which they were trying to appeal, cannot possibly be held to designate an appeal from an order of August 12, 1985.

C. Since The Appellant Failed To File A Notice Of Appeal Within The 30 Day Period Required By App. R. 4(A) The Dismissal Of The Appeal Does Not Deny Him Due Process, Even Though The Appellee Received A Copy Of The Said Notice, And Request For Preparation Of Transcript.

Appellant claims that his constitutional right of due process was violated because he has been denied a trial on the merits in this case. This is yet another misrepresentation of the true issue before this Court. To reiterate succinctly, the instant attempt to rest jurisdiction in the Court of Appeals deals with the Trial Court's overruling on August 12, 1985, the appellant's Civ. R. 60(B) Motion to Vacate and Motion to Amend Pleadings (the later motion completely moot since final judgment was rendered March 22, 1985). Assuming, *arguendo*, that an appeal was properly pursued, it would never get to the merits of the Court's March 22, 1985 decision and final judgment, because there was never an appeal attempted or pursued. The appellant made a conscious decision not to appeal the final judgment of March 22, 1985 and later for some unknown reason filed a motion to vacate and to amend pleadings. The courts have continuously refused to allow a

litigant to do by indirection what he cannot do directly. It is well stated in *Bosco v. City, supra* at 43:

> "The purpose of a strict rule is a salutary one. It requires litigants to be alert to insure an orderly and prompt processing of appeals. Under statutes predecessor to Civ. R. 60(B), the courts of this State have strictly enforced the policy of refusing to allow the amendment of final orders for the sole purpose of renewing the appeal period to rescue a litigant from his own lethargy or lack of vigilance in filing a timely notice of appeal:
>
> "'. . . The appellant seeks to do by indirection that which he cannot do directly. The time to appeal the judgment declaring that Raveca Marginean is not the widow and surviving spouse of the deceased has long since passed. Raveca Marginean now wants to again claim that she is the surviving spouse by a motion to vacate all proceedings taken in the probate of the will and matters arising therein. This she cannot do.' *In re: Estate of Marginean* (1961), 87 Ohio L. Abs. 314, 317.
>
> * * *
>
> "The motion to vacate in the present case is no different in generic objective from the Motions in *Marginean* and in *Demers*. The issue it raises responds to the rules established in those cases. A reversal of the order of the Court below will achieve nothing but a hearing on the question of vacation of a judgment which the circumstances would make it an abuse of discretion to grant. For it is apparent that were appellants' facts proven true on hearing, the principal consequence would be a fresh denial and a

> new period of thirty days within which to file a notice of appeal from that denial. The review of the substantive determination thus sought was appropriate in the first appeal but was forfeited by delay."

See also Bond & Assoc. v. Dev. Corp. (1978), 54 Ohio St. 2d 363.

There being no denial of a substantial right, there can be no denial of due process. The only issue here is whether or not the appellant's attempted, but failed, filing of his notice of appeal after the 30 day period, can somehow be considered to have been timely filed. The prior cases cited and discussed seem to indicate that under circumstances where the notice was never received by the Clerk as we have here, the Courts have uniformly upheld a dismissal by the Appellate Court for lack of jurisdiction.

Petitioner's reliance upon *Brooks v. Rollins* (1984), 9 Ohio St. 3d 8 to rescue his lost claim of constitutional due process is unfounded. In *Brooks* the Trial Court granted a motion to quash service by publication; on appeal, the Court reversed and ordered the case to proceed on a granted default judgment. The Supreme Court affirmed holding that the original service by publication could be supported by reasonable diligence on the part of plaintiff rather than requiring actual concealment by the defendant. In that case the defendant indeed did not get his day in Court, but instead a default judgment was granted. Indeed, here the appellant has had a full and complete hearing in accordance with O.R.C. 2711.21 and has had every opportunity to *timely* attack the judgment based upon the arbitration award but has failed to do it. The appellant's constitutional argument must fail.

CONCLUSION

Petitioner claims that he is bound by a judgment that is based upon a procedure that was "without trial or hearing whatsoever"; "depriving it of any defense" (pet. 10); "without an opportunity to be heard"; "deprived of recourse to the courts"; "denied the right to defend" (pet. 11). Although appealing to the ear of fair-minded persons, these claims are entirely without foundation.

As the record reveals, the Petitioner did indeed have his day in Court in accordance with the Ohio procedures in a Medical Malpractice case which provide for an arbitration to be held before 3 arbitrators. The hearing was held and both parties were afforded full and complete opportunity to present their claims and defenses. An arbitration award was made in favor of the Respondent and against the Petitioner (App. 16). Indeed, there was a dissenting opinion filed in favor of Petitioner, so his defense was persuasive to someone (App. 25). Petitioner had a right to reject the arbitration award and demand a jury trial; he *voluntarily elected*, rather, to move to modify the award. Final judgment was rendered on the arbitration award and at that point Respondent had 30 days to appeal that final judgment and test the entire proceedings. He *voluntarily elected* not to appeal. That critical decision was not imposed upon him by anyone, it was his voluntary action. He cannot now claim he was deprived of a constitutionally guaranteed right of access to the courts because he elected to waive the trial by jury and move to modify the arbitration award.

Due Process and Equal Protection guarantees of the Constitution cannot be a springboard to try to recapture rights voluntarily and freely given up. Petitioner's own

actions decided exactly how he was to proceed in this case, and he has not been deprived of any constitutionally guaranteed rights. The Petition should fail.

Respectfully submitted,

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